114

(3)

Supreme Court, U.S.
FILED
DEC 12 2008
OFFICE OF THE CLERK

No. 08-478

IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC,

Petitioners,

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION OF WALLY KELLY AND HAROLD GUSTIN

GLENN E. DAVIS
THOMAS B. WEAVER
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
211 North Broadway
St. Louis, MO 63102-2740
(314) 621-5070

Counsel for Respondent Harold Gustin

DANIEL G. ASHBURN
Counsel of Record
THOMAS S. RICHEY
ROBERT M. TRAVIS
WILLIAM B. SHEARER, JR.
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree St., NW
Atlanta, GA 30309-3488
(404) 572-6600

Counsel for Respondent Wally Kelly

QUESTIONS PRESENTED

1. [Not Applicable to Respondents Kelly and Gustin]

2. Whether the Eighth Circuit erred in reversing the RICO judgments against Respondents Kelly and Gustin based upon its determination that Petitioners "failed to produce sufficient evidence of RICO violations by Kelly and Gustin?" *See* Pet. App. at 45a.

3. [Not Applicable to Respondents Kelly and Gustin]

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 4
I. Procedural background 4
II. Factual background. 5
SUMMARY OF ARGUMENT 11
REASONS FOR DENYING THE PETITION AS TO RESPONDENTS KELLY AND GUSTIN 13
I. The Eighth Circuit's determination that Petitioners failed to prove a standard element of a RICO claim against Respondents Kelly and Gustin is legally sound and does not present any "compelling reason" for granting a petition for certiorari under Supreme Court Rule 10. . 13
A. Rule 10(a) does not apply to Question 2... 14
1. Question 2 does not involve a conflict with other federal circuit courts. 14
2. Question 2 does not involve a conflict with a state court of last resort. 15
3. Question 2 does not involve any departure from "the accepted and usual course of judicial proceedings." 15

B. Rule 10(c) does not apply to Question 2. ... 16

1. Question 2 does not involve an important, unresolved point of federal law that this Court must settle. ... 16

2. Question 2 does not involve a conflict with this Court. ... 16

C. Rule 10 discourages petitions that merely allege fact-based errors that are bereft of any compelling federal legal issues, such as the error Petitioners allege in Question 2. 18

II. The Eighth Circuit correctly applied settled law regarding the elements of RICO. ... 19

A. Issues that Petitioners do not challenge. .. 19

B. Petitioners mischaracterize the Eighth Circuit's opinion and the evidence. ... 22

III. The Eighth Circuit decided this case on "continuity"; but there were other dispositive flaws in the Petitioners' RICO claims that the Eighth Circuit did not reach. ... 24

A. There was no evidence that Kelly and Gustin intentionally devised a "scheme to defraud." ... 24

B. Petitioners lack standing under RICO because they were not "injured in their business or property." ... 25

C. Petitioners failed to prove factual or proximate cause. ... 26

CONCLUSION ... 27

TABLE OF AUTHORITIES

Cases

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 26
Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000), *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734, 149 L.Ed.2d 659 (2001) 19-20
Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008) 17, 18, 25
Brown v. Fred's, Inc., 494 F.3d 736, 740 (8th Cir. 2007) 20
H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) ..... *passim*
Hughes v. Consol.-Penn. Coal Co., 945 F.2d 594, 611 (3d Cir. 1991) 23
Jackson v. BellSouth Telecomm, 372 F.3d 1250, 1266 (11th Cir. 2004) 23
Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop., 75 F.3d 1268, 1273 (8th Cir. 1996) 19
Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp., 986 F.2d 1208, 1215-16 (8th Cir. 1993) 23

Statutes

18 U.S.C. §§ 1961 *et seq.* 1, 4
18 U.S.C. § 1962(c) 4, 19
18 U.S.C. § 1964(c) 25

Rules

FED. R. CIV. P. 50 ..... 15, 18, 20, 21
FED. R. CIV. P. 50(a) 4
FED. R. CIV. P. 50(b) 5
SUP. CT. R. 10 ..... *passim*

RESPONDENTS WALLY KELLY AND HAROLD GUSTIN'S BRIEF IN OPPOSITION

INTRODUCTION

Wally Kelly and Harold Gustin oppose the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Petitioners are three local outdoor advertising companies (Craig Outdoor Advertising, Inc. ("Craig"), Midwest Outdoor Media, LLC ("Midwest"), and Patriot Outdoor, LLC ("Patriot")) and a former shareholder of another such company (Curtis Massood). Respondents are a national outdoor advertising company (Viacom Outdoor Inc. ("Viacom")) and two individual senior management employees (Kelly and Gustin). The petition raises three separate questions, each involving different parties and claims.

This Response By Kelly and Gustin

Question 2 is the only question that pertains to Kelly and Gustin, and therefore it is the only question addressed in this response.

In Question 2, Petitioners Craig, Midwest and Patriot challenge the Eighth Circuit's decision to reverse civil judgments under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against Kelly and Gustin because of the lack of evidence of "continuity" required to satisfy the "pattern of racketeering activity" element of RICO. Significantly, Petitioners do not contend that the Eighth Circuit's decision as to Kelly and Gustin is in conflict with any other circuit court, that the Eighth Circuit misstated the

law concerning RICO "continuity," or that the law is unsettled.

Instead, Petitioners attempt to buttress a request for this Court to second-guess the Eighth Circuit's determinations concerning the sufficiency of the evidence of RICO "continuity" under the complicated facts of this particular case, with unfounded accusations that the Eighth Circuit's decision in favor of Kelly and Gustin could only be the result of judicial "hostility" to RICO.

Question 2 does not satisfy any of the reasons that justify this Court's review, nor do Petitioners offer any other "compelling reason" for looking behind the Eighth Circuit's ruling on this matter when there is no disputed point of law.

Questions 1 and 3 are addressed to Viacom

This petition clearly indicates that Questions 1 and 3 are addressed only to Viacom, and they involve issues unrelated to RICO's pattern and continuity requirements.

Question 1 involves Petitioners and Respondent Viacom. Petitioners in that question challenge the Eighth Circuit's decision affirming summary judgment on the civil RICO claims alleged against Viacom. Those claims employed an association-in-fact RICO "enterprise" theory because under established RICO principles Petitioners could not name Viacom as the RICO "enterprise" and sue it as a RICO defendant. After the association-in-fact RICO claims were dismissed, the district court allowed the primary RICO claims naming Viacom as the RICO "enterprise" to proceed against Kelly and Gustin, and two other employees who obtained

defense verdicts. The claims against Kelly and Gustin were reversed by the Eighth Circuit for lack of evidence of "continuity," without regard to the issue of "enterprise." Pet. App. 42a-45a.

Question 3 pertains only to Petitioner Massood and Respondent Viacom. In that claim, Massood asks this Court to review the Eighth Circuit's decision affirming dismissal of his alleged state law and civil RICO derivative action claims that he attempted to bring against Viacom on behalf of a company he sold and thus had no ownership interest in. The Eighth Circuit noted that Massood was aware of the facts underlying his alleged claims before selling his interest in the company. Pet. App. 49a-50a, n.11. The events underlying Massood's claims took place years before either Kelly or Gustin had any involvement in Viacom's railroad right-of-way billboard site licensing.

Neither the merits of Question 2 nor whether it is worthy of this Court's review depend in any way on this Court's decision whether to consider Questions 1 or 3, and the Petitioners have shown no "compelling reason" for this Court to grant review on Question 2. Accordingly, Respondents Kelly and Gustin respectfully request that the petition be denied as to them.

STATEMENT OF THE CASE

I. Procedural background.

Three local billboard companies and a former shareholder of a fourth company brought this lawsuit in 2004 in the Western District of Missouri seeking damages arising out of their applications to Viacom (or one of its predecessors) proposing new billboard sites on railroad property. The plaintiffs claimed that Viacom's employees fraudulently induced them to apply for proposed billboard locations by allegedly representing that Viacom would process their applications on a "first-come, first-served" basis.

Based upon these allegations, the plaintiffs attempted to assert several state law claims (fraud, tortious interference, and unfair competition), and claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against Viacom and several of its current and former employees, including Kelly and Gustin. Prior to trial, the district court dismissed plaintiff Massood's claims for lack of standing and granted summary judgment on the RICO claims against Viacom. Pet. App. 53a-55a, 62a-66a.

At trial, the three remaining plaintiffs elected to present their state law claims against only Viacom, and limited their claims against the individual defendants to RICO claims under 18 U.S.C. § 1962(c), based upon alleged predicate acts of mail and wire fraud. Appellants' Joint Appendix ("AJA") 1550-1608. At the close of the evidence, the district court denied the defendants' Rule 50(a) motion for judgment as a matter of law. *Id.* at 1519-42; Trial

Tr. 2088-2131. The jury returned defense verdicts for two individual Viacom employees (Randall Romig and Randy Jackson), but returned verdicts in favor of the remaining plaintiffs on their state law claims against Viacom and their RICO claims against Viacom executives Kelly and Gustin. AJA 1721-28. Defendants' renewed motion for judgment as a matter of law under Rule 50(b) was also denied. *Id.* at 1729-61, 2013-16.

On appeal, the Eighth Circuit held the trial court erred in denying Kelly and Gustin's motion for judgment as a matter of law because Petitioners failed to present sufficient evidence to support the "continuity" component of a RICO "pattern of racketeering activity" against Kelly and Gustin. Pet. App. 42a-45a.

The Petitioners disagree with the Eighth Circuit's determination regarding the sufficiency of the evidence on RICO continuity, and this disagreement is the basis for Question 2 of their petition.[1]

II. Factual background.

Viacom was formed as a new company near the end of 2001 when its parent company merged the operations of two outdoor advertising subsidiaries: Outdoor Systems, Inc. ("Outdoor") and Transportation Displays Inc. ("TDI"). Trial Tr. 1380-81. Wally Kelly had worked for Outdoor since it was founded as a small independent billboard company in 1984. *Id.* at 1327, 1376. Gustin had worked for

---

[1] As explained below, Kelly and Gustin had numerous other grounds for reversal which the Eighth Circuit did not reach.

TDI since 1989. *Id.* at 777. The parent company asked Kelly to serve as the president of the new Viacom and to oversee the integration of Outdoor and TDI. *Id.* at 1381.

Outdoor's primary business was selling advertising on billboards on property it owned or leased. *Id.* at 1348, 1383-84, 1412. TDI's primary business was transit system advertising, *e.g.*, on buses and commuter trains. *Id.* at 778-79.

Prior to their consolidation, TDI and Outdoor had entered into a number of agreements with railroads that gave them exclusive easement and licensing rights on railroad property that they could use for themselves or lease or license to others for the purpose of constructing and operating billboards. *Id.* at 777-80, 982-83; Compendium of Trial Exs. ("Trial Exs.") 1019-1059, 1229-1309. On consolidation, Viacom succeeded to TDI and Outdoors' rights under these railroad agreements. Trial Tx. 1379.

Kelly's experience and responsibilities at Outdoor had been in sales of advertising space. He had not been involved with billboard site leasing and acquisitions on railroad property or otherwise. Kelly also had no involvement in TDI prior to the formation of Viacom in late 2001. *Id.* at 1384.

Gustin had been a Senior Vice-President at TDI, and had been involved in negotiating some of TDI's contracts with railroads. *Id.* at 777. In his role, Gustin typically did not interact with billboard site applicants; TDI's field personnel dealt with applicants. *Id.* at 784.

As part of the integration of Outdoor and TDI, Kelly combined the two railroad licensing programs

into a "Landlease" group. Gustin became Viacom's Vice-President of Landlease. *Id.* at 1348-51.

During January 2002, Kelly hosted introductory meetings with various newly-combined departments of Viacom. Kelly held such a meeting for the new Landlease group on January 29, 2002. *Id.* at 1382-87.

Petitioners claim that it was at this 30-40 minute meeting – Kelly's only meeting with the Landlease group – that Kelly unveiled an alleged "scheme to defraud" other billboard companies who wanted to apply for sites on railroad property under Viacom's control. But the unrebutted evidence at trial was that Kelly simply directed that any applications received should be reviewed by Viacom to determine whether it was in Viacom's best interest to enter into a license agreement for the proposed site with the applicant. *Id.* at 1344-46, 1387-88. Kelly explained:

> Everybody in the meeting believed . . . that . . . we had the exclusive rights to these easements and that an application was just a mere process. It certainly wasn't a contract or in any way, shape or form an entitlement of any billboard company to submit to us and immediately feel they were going to be given a board.

Id. at 1361.

Significantly, the Petitioners do not claim that they had any actual entitlement to license the sites they proposed, or that the review process that Kelly instituted was itself illegitimate. *Id.* at 462-63. Petitioners do not dispute the Eighth Circuit's description of their RICO claim, as follows:

> Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure – thereby fraudulently inducing Plaintiffs to submit applications – but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself.

Pet. App. at 44a.

The unrebutted testimony of every person present at the January 2002 meeting confirmed that there was no discussion whatsoever about what applicants should or should not be told about the review process or any other matter. Trial Tx. 180-81, 783-84, 1176, 1355-56, 1472, 1750, 1823. There was no evidence at trial that either Kelly or Gustin ever suggested or directed that Viacom employees should conceal or misrepresent to anyone Viacom's review of billboard site applications. In fact, Kelly never had any contact or communication with any applicants, and each of the plaintiffs testified that Kelly had made no misrepresentations or deceived them. *Id.* at 513, 684, 1401, 1678-79 Nor did he know what they were told. *Id.* at 1362-63, 1398-99. Although Gustin had some limited contact with applicants, these communications occurred almost exclusively after the applicants had already submitted their applications.

The Eighth Circuit, however, did not reach the issue of whether there was any evidence that Kelly or Gustin in fact devised or participated in a fraudulent scheme, whether they in fact committed any particular predicate act of mail or wire fraud, whether there was scienter, or whether any act of Kelly and Gustin was the proximate cause of any injury to business or property suffered by any plaintiff. Instead, the Eighth Circuit "focus[ed] on whether, assuming for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged, Plaintiffs' evidence was sufficient to establish that those predicate acts can be said to form a pattern of racketeering activity." Pet. App. at 43a. The Eighth circuit concluded that the evidence was insufficient as a matter of law.

In reviewing the sufficiency of the evidence as to RICO's "pattern of racketeering activity" element, the Eighth Circuit correctly quoted and relied exclusively on this Court's seminal opinion on that issue:

> In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court observed that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." Continuity in this context refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. To satisfy the RICO continuity

> element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence the alleged predicate acts threaten to extend into the future (open-ended continuity). *Id.* at 242. A plaintiff may establish open-ended continuity by showing that the predicate acts themselves involve a distinct threat of long-term racketeering activity or that the predicate acts constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise. *Id.* at 242-43.

Pet. App. at 43a-44a. Citing the jury instructions in this case, the Eighth Circuit pointed out that:

> [T]he only theory advanced by Plaintiffs with respect to the continuity element was a theory of open-ended continuity. . . . Accordingly, Plaintiffs were required to show that the predicate acts of mail fraud and wire fraud committed by Kelly and Gustin "project[ed] into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241.

Pet. App. at 44a.

Applying the established law of RICO "continuity" to the facts of this case, the Eighth Circuit concluded that the evidence did not support the RICO theory Petitioners had asserted against Kelly and Gustin:

> In January 2003, however, Viacom began routinely transmitting a standard form letter to all site applicants notifying them that their applications were subject to review by Viacom.

> At that time, Viacom effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion. Because there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future, Plaintiffs' theory of RICO continuity, and thus their RICO claims against Kelly and Gustin, must fail.

Id. at 44a-45a. Accordingly, the Eighth Circuit reversed the RICO judgments against Kelly and Gustin on this basis.

SUMMARY OF ARGUMENT

Question 2 is the only issue that pertains to Respondents Kelly and Gustin. In that question, Petitioners ask this Court to review the Eighth Circuit's unremarkable ruling that the evidence was legally insufficient to establish the required "continuity" element of RICO on their claims against Kelly and Gustin. This question does not involve any of the reasons this Court traditionally considers for granting a petition, such as a split among the circuits or an unsettled point of federal law. Rather it falls squarely within the category of issues that Supreme Court Rule 10 cautions against: an asserted error that, at most, "consists of erroneous factual findings or the misapplication of a properly stated rule of law."

While Petitioners attempt to "dress-up" their petition by characterizing the Eighth Circuit's decision with regard to Kelly and Gustin as improperly "narrowing RICO," the fact is that Petitioners do not contest the correctness of *any* of the Eighth Circuit's statements of the law on this question. The Eighth Circuit explicitly set out this Court's basic instructions regarding the "continuity" component of a "pattern of racketeering activity" in *H.J. Inc.*, and correctly applied those rules to determine whether the evidence of "continuity" was sufficient as a matter of law. The Eighth Circuit carefully examined the extensive record in this case and followed the proper standard of review. Although Petitioners contest the outcome, there is no "compelling reason" for further review.

In addition to the lack of "continuity," Kelly and Gustin identified other critical defects in Petitioners' RICO claims against them on appeal – such as lack of intent, the absence of injury to "business or property," and the failure to show proximate cause – which the Eighth Circuit did not find necessary to address because the "continuity" issue was dispositive. These other deficiencies likewise weigh against granting review as to Question 2, which does not present an issue of importance beyond the parties and circumstances of this particular case.

REASONS FOR DENYING THE PETITION AS TO RESPONDENTS KELLY AND GUSTIN

I. The Eighth Circuit's determination that Petitioners failed to prove a standard element of a RICO claim against Respondents Kelly and Gustin is legally sound and does not present any "compelling reason" for granting a petition for certiorari under Supreme Court Rule 10.

Petitioners challenge the Eighth Circuit's decision reversing civil RICO judgments against these two individuals solely because they disagree with that Court's conclusion that there was insufficient evidence, in this particular case, to establish that each individual engaged in a "pattern of racketeering activities." Rather than involving any dispute about the law, this question concerns nothing more than Petitioners' disagreement with the Court of Appeals about the significance of certain evidence to the specific claims arising out of the unusual circumstances of this particular case. Consequently, Petitioners have not identified any "compelling reason" for this Court to reassess the Eighth Circuit's conclusions, which were based upon its thorough review and careful analysis of the voluminous record in this case.

The specific considerations identified in Supreme Court Rule 10(a)-(c), while not exhaustive, "indicate the character of the reasons the Court considers" in selecting questions for review. SUP. CT. R. 10. This Court should deny review of Petitioners' Question 2, because it does not fall within any of the considerations listed in Rule 10(a)-(c), nor does it

present the kind of broad-based issues that would be of any appreciable significance beyond the parties to this case. The Eighth Circuit's ruling was a routine, fact-based application of long-established, widely accepted principles to a specific case and does not merit this Court's review.

A. Rule 10(a) does not apply to Question 2.

1. Question 2 does not involve a conflict with other federal circuit courts.

Petitioners make no claim that the Eighth Circuit's decision concerning RICO's "continuity" element is "in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10(a). In the section of their petition addressing Question 2, Petitioners do not even refer to or cite any circuit court opinion other than the Eighth Circuit's opinion in this case (except to note the Eighth Circuit's citation to a 2007 Eighth Circuit opinion). Indeed, the Eighth Circuit conducted a straightforward analysis of the "continuity" issue in this case under this Court's primary authority on that issue, *H.J. Inc.*, without needing to refer to sister circuit or lower court authority. Moreover, the Eighth Circuit's decision cannot be in conflict with another court of appeals "on the same important matter," since the Eighth Circuit's decision was about the significance and sufficiency of the evidence in this specific case, and not on a principle of law on which there is any conflict among the circuits.

2. Question 2 does not involve a conflict with a state court of last resort.

Petitioners also do not claim that, in rejecting the RICO claims due to the failure of proof of "continuity," the Eighth Circuit "decided an important federal question in a way that conflicts with a decision by a state court of last resort." SUP. CT. R. 10(a).[2] Question 2 does not involve any issue of state law. The question here is simply a federal question of whether Petitioners proved every element of a unique federal claim in a case in which the law regarding those elements is undisputed.

3. Question 2 does not involve any departure from "the accepted and usual course of judicial proceedings."

The final reason for review of a court of appeals' decision identified in Rule 10(a) that this Court considers potentially "compelling" is when the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). Petitioners do not assert that the Eighth Circuit has departed in any way from the "accepted and usual course of judicial proceedings."

The Eighth Circuit made decisions on the sufficiency of the evidence under FED. R. CIV. P. 50 and resolved most of them in the Petitioners' favor on numerous state law issues. The fact that, as to the RICO claims, the Eighth Circuit also found that the Petitioners failed to meet FED. R. CIV. P. 50's

---

[2] Similarly, Supreme Court Rule 10(b) does not apply here, because it pertains only to a petition challenging the decision of a state court of last resort.

standard on the "continuity" requirement exhibits no deviation from established procedure or authority. The Eighth Circuit did nothing to warrant an exercise of this Court's supervisory authority.

B. Rule 10(c) does not apply to Question 2.

1. Question 2 does not involve an important, unresolved point of federal law that this Court must settle.

Petitioners do not claim that, in reviewing the evidence concerning the "continuity" element of RICO in this case, the Eighth Circuit was confronted with an important issue of federal law "that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). This Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 299 (1989), held that "continuity" is an essential component of a "pattern of racketeering activity" necessary to state a RICO claim, and established the two prevailing concepts of "closed-ended" and "open-ended" continuity. Petitioners do not claim that the Eighth Circuit failed to correctly identify and state the principles concerning "continuity" established in *H.J. Inc.*, which the Eighth Circuit explicitly quoted and cited, nor do they contend that those principles are unsettled. Question 2 does not involve any unresolved point of federal law.

2. Question 2 does not involve a conflict with this Court.

Petitioners do not contend that the Eighth Circuit's decision conflicts with this Court's decision in *H.J. Inc.*, which is the relevant decision of this Court concerning RICO's "continuity" element. Instead, Petitioners attempt to invent a conflict

between the Eighth Circuit's decision in this case and this Court's opinion in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008), issued five days later.

In *Bridge*, this Court held that first-party reliance on a defendant's alleged misrepresentations is not an essential element of a RICO claim predicated on mail fraud. *Id.* at 2134. In the Kelly and Gustin case, however, the Eighth Circuit did not rule on the issue of reliance with regard to the RICO claims. The "continuity" element was not at issue in *Bridge* and was not even discussed in that case.

Nevertheless, Petitioners point to the Eighth Circuit's passing dicta at the end of its RICO "continuity" discussion, where the Eighth Circuit noted: "We have in the past rejected attempts to convert ordinary civil disputes into RICO cases." Pet. App. 45a. Petitioners inaccurately characterize this comment as the basis for the Eighth Circuit's decision, and seek to equate it with an argument this Court rejected in *Bridge*, that a "first-party reliance" requirement should be added to civil RICO "in order to avoid 'over-federalization' of traditional state-law claims." Petitioners then unjustifiably assert that the Eighth Circuit acted in "open defiance of controlling authority" and "rebell[ed] against this Court's often repeated instruction that RICO cannot be narrowed based on judicial hostility." Pet. 19. Petitioners' pejorative language and heavy reliance upon the Eighth Circuit's obvious dicta expose the weakness of their claim.

Bridge is neither controlling authority, nor does the Eighth Circuit's discussion conflict with *Bridge*.

In this case, the Eighth Circuit was indisputably correct in observing that RICO claims have additional requirements – such as "continuity," pattern, and enterprise – not found in ordinary civil disputes, and Petitioners do not claim otherwise. The Eighth Circuit properly pointed out this distinction here, where it allowed state law claims (including common law fraud) against Viacom to stand but determined that the evidence did not establish the requisite "continuity" to state a RICO claim against Kelly and Gustin.

This Court's opinion in *Bridge* was concerned with quite the opposite – whether lower courts were imposing additional requirements on RICO claims that are not contained in the RICO statute or recognized by this Court. Thus, no conflict exists between the Eighth Circuit's decision and a decision of this Court.

C. Rule 10 discourages petitions that merely allege fact-based errors that are bereft of any compelling federal legal issues, such as the error Petitioners allege in Question 2.

Rule 10 concludes: "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Petitioners' Question 2 is precisely the kind of issue that Rule 10 seeks to discourage.

The Eighth Circuit determined, after an exhaustive review of an extensive record, that the District Court erred in failing to grant judgment as a matter of law under FED. R. CIV. P. 50 on the RICO claims against Kelly and Gustin because the jury did

not have a legally sufficient evidentiary basis to find that they had engaged in the pattern of racketeering activity required under 18 U.S.C. § 1962(c).

The alleged error asserted by Petitioners is, again, nothing but a disagreement with the Eighth Circuit's conclusions concerning the sufficiency of the factual evidence. Accordingly, Question 2 does not present an issue that would be of significance beyond this case, and does not merit this Court's review.

II. The Eighth Circuit correctly applied settled law regarding the elements of RICO.

A. Issues that Petitioners do not challenge.

Petitioners do not challenge a single point of law stated by the Eighth Circuit in its review of the RICO claims against Kelly and Gustin. The Eighth Circuit did not give these issues short shrift, but gave a detailed and correct statement of the legal issues essential to its holding on these claims.

First, the Petitioners do not claim that the Eighth Circuit failed to identify the proper standard of appellate review as to these claims. The Eighth Circuit stated those standards as follows:

> We review a district court's denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court. *Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop.*, 75 F.3d 1268, 1273 (8th Cir. 1996). Judgment as a matter of law following a jury verdict is appropriate only when "the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228

> F.3d 872, 878 (8th Cir. 2000), *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734, 149 L.Ed.2d 659 (2001). In conducting our review, we consider the evidence in the light most favorable to the nonmoving party, here the Plaintiffs, giving that party the benefit of all favorable inferences that can reasonably be drawn from the evidence. *See Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007).

Pet. App. at 42a. Petitioners nowhere contend that the Eighth Circuit misidentified or misstated the appropriate standard of review under FED. R. CIV. P. 50, which it explicitly applied here. Although Petitioners argue that the Eighth Circuit "substituted its interpretation" of the evidence for that of the jury and "gave no deference" to the jury's verdict, the fact that the Eighth Circuit reversed the judgment does not mean that it give the verdict "no deference." Indeed, the Eighth Circuit's detailed opinion demonstrates that it repeatedly showed deference to the jury's verdict. FED. R. CIV. P. 50 does not require a court to give *absolute* deference to the jury verdict; otherwise there would be no review. As an appellate court, it was the Eighth Circuit's role to review the evidence and determine, as a matter of law, whether the evidence met the threshold of proof necessary to establish every element of Petitioners' claims.

Second, Petitioners do not claim that the Eighth Circuit failed to properly set out the standard elements required for a civil RICO claim. *See* Pet. App. 42a-43a. Specifically, Petitioners do not contest the Eighth Circuit's holdings that the essential elements of a RICO violation, including engaging in

a pattern of racketeering activity, must be established as to each individual defendant, and that the "[f]ailure to present sufficient evidence on any one element of a RICO claim means the entire claim fails." *Id.*

Third, Petitioners do not claim that the Eighth Circuit failed, in any way, to correctly outline and apply this Court's explanation of the specific issue of RICO "continuity" in *H.J. Inc.* *Id.* at 43a-44a. Specifically, Petitioners do not dispute or challenge "continuity" as an essential component of proof of a RICO "pattern of racketeering activity," that Petitioners only advanced "open-ended continuity," the Eighth Circuit's statement and application of the legal requirement of "open-ended continuity," or what the Eighth Circuit said the Petitioners had to prove to meet these requirements.

Finally, Petitioners do not contest the Eighth Circuit's determination that the alleged "culpable act" on which the RICO claims depended was "using the mails and wires to conceal or misrepresent the review process; it was not the process itself. *See* Pet. App. 44a. The Eighth Circuit correctly identified the crux of Petitioners' RICO theory against Kelly and Gustin, which Petitioners also do not challenge.

In sum, Question 2 does not involve any genuine dispute regarding the correctness of the Eighth Circuit's statement of the law and issues as to Petitioners' RICO claims against Kelly and Gustin. Instead, the issue is the Eighth Circuit's determination regarding the legal sufficiency of the evidence in this case, again a task that FED. R. CIV. P. 50 requires the Eighth Circuit to perform.

B. Petitioners mischaracterize the Eighth Circuit's opinion and the evidence.

In an effort to create a reviewable issue where there is none, Petitioners mischaracterize both the Eighth Circuit' opinion and the evidence. Petitioners unfairly claim that the Eighth Circuit is "hostile" to RICO claims and ruled against Petitioners in a surreptitious effort to "undermine" RICO in the manner of a "Trojan Horse" and "narrow" its scope.

The Eighth Circuit did nothing of the sort. It correctly applied *H.J. Inc.* in just the way this Court specified. In *H.J. Inc.*, this Court expressly recognized the continuity requirement as a concept that Congress intended to distinguish the conduct targeted by RICO from isolated or short-term activity:

> [W]e have concluded . . . that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.

492 U.S. at 243 n.4.

The Court in *H.J. Inc.* stated that to establish open-ended continuity the plaintiffs must prove "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. The Court in *H.J.* further acknowledged the highly fact-bound character of the inquiry: "Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." *Id.* at 242.

Far from usurping the jury's function, the Eighth Circuit properly engaged in the application of *H.J. Inc.'s* RICO "continuity" standard to the "specific facts of each case" as part of the judicial process through which the concept of "continuity" is to be measured and assessed. *Id.*

Petitioners also mischaracterize the evidence upon which the Eighth Circuit relied in concluding that "open-ended continuity" did not exist. Petitioners are incorrect in asserting that the January 2003 letter could only terminate the allegedly "fraudulent scheme" if it "actually revealed that Viacom would take the good sites for itself, thereby nullifying the fraud." As recognized by the Eighth Circuit, the January 2003 letter terminated any allegedly fraudulent scheme by advising applicants of Viacom's review process. Viacom thereby put applicants on notice, less than a year after the alleged scheme had begun,[3] that an applicant – even if first to apply – was by no means entitled to receive a license to a site.

The Eighth Circuit ruled that the disclosure of a review process in the January 2003 letter and Viacom's role in it was legally sufficient to terminate

---

[3] The Eighth Circuit found, and Petitioners do not dispute, that Petitioners did not attempt to meet the "pattern of racketeering activity" requirement by proving "closed-end continuity." Pet. App. at 44a. In any case, courts generally agree that evidence of predicate acts over a period less than one year is insufficient to satisfy "closed-end continuity." *See, e.g., Jackson v. BellSouth Telecomm*, 372 F.3d 1250, 1266 (11th Cir. 2004); *Cofacredit v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999); *Hughes v. Consol.-Penn. Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991); *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-16 (8th Cir. 1993).

any alleged scheme. Given the position advanced by the Petitioners themselves at trial that the failure to disclose the review process itself constituted the alleged fraud under RICO, the Eighth Circuit was correct in that conclusion.

III. The Eighth Circuit decided this case on "continuity"; but there were other dispositive flaws in the Petitioners' RICO claims that the Eighth Circuit did not reach.

Question 2 would also not provide an effective vehicle for review on certiorari because the RICO claims were fatally flawed in other ways as well. Having concluded that the evidence was insufficient as to "continuity," the Eighth Circuit simply did not reach these other issues that Kelly and Gustin raised on appeal.

A. There was no evidence that Kelly and Gustin intentionally devised a "scheme to defraud."

There was literally zero evidence that Kelly or Gustin, both corporate executives, suggested or directed Viacom employees to mislead or conceal the review process or that they were even aware that any applicants were being misled. The evidence established that Kelly had no contact or communication with any of the Petitioners or other applicants, and there is no evidence that Kelly or Gustin ever concealed or made any misrepresentations to Petitioners to induce them to apply for billboard sites.

There was thus no evidence that Kelly or Gustin intentionally devised or participated in a "scheme to defraud," which is an essential element of the RICO

predicate act of mail fraud. *See Bridge*, 128 S. Ct. at 2138 ("The gravamen of the offense [of mail fraud] is the scheme to defraud").

Even if other employees of Viacom misled or concealed the review process, there is no basis under RICO for holding Kelly and Gustin vicariously liable for the acts of Viacom or its other employees.

B. Petitioners lack standing under RICO because they were not "injured in their business or property."

As disappointed applicants proposing to engage in negotiated transactions with private parties, Petitioners were not "injured in their business or property" under 18 U.S.C. § 1964(c) by not being granted licenses on a first-come, first-served basis. Petitioners do not claim that the mere unilateral act of submitting an unsolicited application to a private party in commerce created a legal entitlement to obtain a license to a billboard site, or that Viacom was obligated to grant such a license, simply because they applied. Petitioners also did not claim or present any evidence at trial of any expense incurred in identifying possible sites on railroad property, which admittedly was based entirely upon publicly available information. Moreover, the Petitioners were not injured in their business or property by their disclosure of potential sites to Viacom, since Petitioners would in any case have to disclose the sites to Viacom in order to apply even after Viacom's review process is fully disclosed, and Petitioners would have no more or less entitlement to a license agreement.

C. Petitioners failed to prove factual or proximate cause.

Finally, Petitioners failed to prove that Kelly or Gustin committed any RICO predicate act of mail or wire fraud that was the "but-for" or proximate cause of Petitioners' alleged injuries under *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). In *Anza*, this Court held that a RICO claim requires proof of a "direct causal connection" between the defendant's alleged RICO violation and the alleged injury.

Petitioners' proof of proximate cause was deficient in several ways. According to the Petitioners' RICO theory, it was the alleged misrepresentation or concealment of the review process, not the review process itself, that constituted the alleged fraudulent scheme. But the Petitioners cannot show that they would have obtained the sites they proposed if the review process had been disclosed. Petitioners also did not present evidence that owners of neighboring property would have been willing to lease or license that property to them if they had not applied to Viacom. In addition, several of the specific proposed sites had other proximate cause problems, including the fact that some applications were submitted prior to the institution of the review process, evidence that the railroads refused to process some applications, and admitted zoning problems.

These additional deficiencies in Petitioners' RICO claims against Kelly and Gustin, which the Eighth Circuit did not reach due to its dispositive determination as to RICO "continuity," further show why this case does not merit this Court's review.

CONCLUSION

For the reasons stated above, Respondents Kelly and Gustin respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

GLENN E. DAVIS
THOMAS B. WEAVER
ARMSTRONG TEASDALE LLP
One Metropolitan Square
Suite 2600
211 North Broadway
St. Louis, Missouri 63102-2740
(314) 621-5070

Counsel for Resp. Harold Gustin

DANIEL G. ASHBURN
Counsel of Record
THOMAS S. RICHEY
ROBERT M. TRAVIS
WILLIAM B. SHEARER, JR.
POWELL GOLDSTEIN LLP
One Atlantic Center
Fourteenth Floor
1201 W. Peachtree St., NW
Atlanta, Georgia 30309-3488
(404) 572-6600

Counsel for Resp. Wally Kelly